

U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



Date Issued: JUN 14, 1986

Case No. 86-BCA-2

In the Matter of

NATIONAL COUNCIL OF LA RAZA,
Appellant (Contractor)

v.

U.S. DEPARTMENT OF LABOR (DOL)
Respondent
Contract No. 99-1-2579-33-7

Raul Yzaguirre, Esq.
For the Appellant

Frank P. Buckley, Esq.
For the Respondent

DECISION AND ORDER

Statement of the Case

On August 15, 1985, the DOL contracting officer issued a decision predicated on the appellant's purported errors in its overhead rate proposals which identified certain costs as "indirect" rather than direct. On November 5, 1985, appellant filed a timely appeal to the DOL Board of Contract Appeals. The hearing was held November 9, 1987. The parties submitted proposed findings of fact and conclusions of law the latter part of March, 1988. Accordingly, the record is closed as of April 1, 1988.

Findings of Fact

1. The contractor and the Department executed Contract No. 99-1-2579-33-7 on November 5, 1980 and December 1, 1980 respectively. The contract required the contractor to carry out the planning and design phase for the development of a Multicultural Career Intern Program demonstration Project. Respondent's Exhibit No. (R.) 1, Tab C.

2. On March 29, 1985, the Department's Office of Cost Determination (OCD) informed the Contracting Officer of a dispute under the contract regarding indirect costs. OCD stated that the parties had been unsuccessful in attempting to agree on a final indirect cost rate for fiscal year 1981 and that the contractor had failed to submit an indirect cost rate proposal for fiscal year 1982. R.1, Tab B, p. 18.

3. On August 15, 1985, the Contracting Officer issued a Final Determination disallowing all costs under the contract because of the contractor's failure to submit an acceptable indirect cost rate proposal for fiscal year 1981 and its failure to submit an indirect cost rate proposal for fiscal year 1982. R.1, Tab A, p. 8.

4. On December 27, 1985, the contractor submitted an indirect cost rate proposal for fiscal year 1982 to the Contracting Officer. R. 4.

5. On April 29, 1986 and March 13, 1987, OCD requested additional information from the contractor regarding its indirect cost rate proposal for fiscal year 1982. R. 5 and 6.

6. On May 6, 1987, the contractor submitted a revised indirect cost rate proposal for fiscal year 1982. R. 7; Transcript (T.) p. 30.

7. On June 29, 1987, the Contracting Officer issued a Revised Final Determination. The Contracting Officer's decision stated that the contractor used improper costing methods to establish the proposed indirect cost rates. R. 3.

8. On September 23, 1987, the contractor submitted additional information regarding its indirect cost rate for fiscal year 1982. The information related to the duties and functions of the contractor's ORAL and Policy Analysis units. The contractor contended that the costs relating to these components should be part of its indirect cost pool for fiscal year 1982. R. 8.

9. On November 5, 1987, the Contracting Officer issued a second Revised Final Determination. The Contracting Officer did not alter his analysis of the contractor's indirect cost rate proposal for fiscal year 1982 but did reduce the amount of disallowed costs as a result of the new information submitted by the contractor regarding the amount of indirect costs it had recovered under its fiscal year 1982 contracts. R. 10.

Fiscal Year 1981

10. Carola Chapa - The parties stipulated at the hearing that the costs associated with the IPA assignment of Carola Chapa should not be included in the indirect cost pool or the direct cost base. T. p. 119.

11. La Raza Production Center - The parties agree that the costs associated with this term were properly deleted from the indirect cost pool because they are not allowable administrative costs. T. p. 21. The amount in question consists of costs for camera rental, syndication fees and consultant fees in connection with a particular project, i.e., direct costs. R. 1, Tab B, p. 21; T. p. 21, APF¹. p. 2

12. Agenda, Lobbying and Legislation - The contractor excluded the costs relating to "Agenda", lobbying and legislation from the indirect cost pool. It did not add them to the direct cost base so that they could be allocated an equitable share of the indirect cost pool. R. 1, Tab B, pp. 21-23, 56. "Agenda" is a bi-monthly journal of Hispanic issues. R. 11. It is produced by NCLR's Office of Public Information and contains articles of interest to the Hispanic community and is disseminated to the general public. R. 11; T. pp. 88, 90 and 91.

13. Rockefeller, Mott, New World

a. The contractor received grants from several foundations, the Rockefeller Foundation, the New World Foundation and the Charles Stewart Mott Foundation. R. 1, Tab B, pp. 25-38. The contractor excluded the costs associated with these grant activities from its direct cost base thereby not allocating indirect costs to these programs. R. 1, Tab B, p. 21; T. p. 23. The rationale for this practice was disputed by the contractor's CPA firm R. 1, Tab B, p. 39; T. pp. 25 and 26.

These grants require the functions provided by the indirect cost pool, i.e., executive direction, management, administrative and financial support. Each incurred salaries and occupied space. R. 1, Tab B, p. 21; T. pp. 24, 51 and 52. Tab D, p. 118; OMB Circular A-122, ATT. A. para. B. 3.

b. The Contractor included the costs associated with its grant activities in its direct cost base for fiscal year 1980, T. pp. 27-28.

¹ APF = Appellant's Proposed Findings of Fact and
Conclusions of Law
RPF = Respondent's Proposed Findings of Fact and
Conclusions of Law

b. Fiscal Year 1982

14. Communications, Interest and Suspense Costs

The costs under "Communciations" are the same kinds of costs considered under the heading of "Agenda" for fiscal year 1981. T. p. 104. The contractor did not include the interest and suspense costs in the indirect cost pool. T. pp. 31-33.

15. ORAL and Policy Analysis

a. ORAL is "an analysis office that is in charge of lobbying and legislation activity." T. p. 41. The Policy Analysis unit was funded by a grant from the Rockefeller Foundation to assess the impact of policies on the activities of the contractor and the Hispanic community. T. pp. 36-39.

b. The foundation grants were not for general support of the contractor. The grants were for a particular purpose intended to benefit the Hispanic community at large. R. 1, Tab B, pp. 25-38; R. 9; T. p. 76. These costs are not administrative in nature T. pp. 38-41, 78-83; R. 9.

c. The contractor did not include the costs associated with these units in its indirect cost pool for 1980 and 1981, T. pp. 41 and 42.

Conclusions of Law

1. This proceeding arises under the Contract Disputes Act of 1978, 41 U.S.C. §§601 et seq.

2. Direct costs are those that can be identified specifically with a particular final cost objective, i.e., a particular award, project, service or other direct activity of an organization. R. 1, Tab D, p. 118, OMB Circular A-122, ATT. A, para. C.I.

3. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. R1, Tab D, p. 118, OMB Circular A-122, ATT. A, para. C. 1).

A. Fiscal Year 1981

4. La Raza Production Center - These costs, associated with production of a film, are public information service costs which are unallowable under OMB Circular A-122, ATT. B, para. 36. R. 1, Tab D, p. 124. They must also be considered direct costs under OMB Circular A-122, ATT. A, para. B. 4. R. 1, Tab D, p. 118.

Accordingly, the contractor should not have included these costs in its indirect cost pool for fiscal year 1981 and it was proper for the Contracting Officer to delete these costs from the indirect cost pool for fiscal year 1981. R. 1, Tab B, pp. 20-21; T. p. 21.

5. Agenda, Lobbying and Legislation

a. The costs associated with the publication of "Agenda" are public information service costs which are unallowable under OMB Circular A-122, ATT. B, para. 36. R. 1, Tab D, p. 124; T. pp. 88-90. Costs associated with lobbying and legislative activities are also unallowable under OMB Circular A-122, ATT. A, para. B.4.b. and c. R. 1, Tab D, p. 118. Although unallowable, these costs must be added to the direct cost base so that they can bear their fair share of overhead costs. OMB Circular A-122, ATT A, para. B.4; T. pp. 55 and 56.

b. The costs associated with the publication of "Agenda" cannot be considered allowable under OMB Circular A-122, ATT. B, para. 11 as a publication relating to employee morale, as argued by the contractor, because it is not directed solely to the contractor's employees but is directed to the Hispanic community and the general public. R. 11; T. pp. 88, 89 and 91.

6. Rockefeller, Mott and New World - In carrying out the objectives of the grants received from these organizations, the grants benefited from the functions included in the contractor's indirect cost pool, i.e., executive management and administrative support. The grants also incurred salaries and occupied space. Consequently, they must be included in the direct cost base and bear their fair share of indirect costs. R. 1, Tab D, p. 118; OMB Circular A-122, ATT. A, para. B.3. and C.

The appellant's accountant, Mary E. Hanson, CPA, stated in her January 18, 1982 letter in agreement with the government's position on

this item:

1. The above named projects have the same characteristics as any other program activity of the Council; namely a funding agency which has contracted with the Council, in writing, to provide a specific line items, and to do it in a specific period of time. By the terms of the contracts, the funds are not to be used for general support. (emphasis supplied)

2. Those projects could not feasibly be carried out without the benefit of those indirect costs which make up the indirect cost pool and which enable the headquarters to continue operations (i.e. accounting, date processing, legal, basic utilities, supplies, and organizational requirements such as Board of Directors and staff training expenses).

3. Your cognizant agency has very strict requirements in the computation and application of the negotiated indirect cost rate. One of these is that the base used for allocation is one which results in an equitable allocation to benefiting activities. The base used by the Council, direct salaries and fringe benefits, is one of the suggested bases. Another requirement is that the base includes all activities which benefit from the indirect costs that are allocated, and it gives a list of 14 activities that should be included. It clearly indicates that activities associated with general funds, restricted funds, grants and contracts, fund-raising activities and others are to be included.

4. If indirect costs are not charged to the Rockefeller, the Aetna and Mott, and the New World funded projects, they would in turn have to be reallocated back to the other projects. The government funded and non-government funded projects at the Council are subject to limitations on indirect costs they can reimburse. If a particular funding agency cannot cover all the indirect costs chargeable to its contract, the uncovered costs cannot be charged back to another government grant or contract.

Conclusion:

It is our opinion that the present allocation method and reporting methods are in accordance with accounting and statutory requirements. Changing the method and base of allocation will not allow the Council to recover any more indirect costs on its Federal contracts."

R. B12, pp. 39

Appellant takes a position that is inconsistent with its earlier practice. It argues that these items are general in nature and should not be treated as direct costs. However, it has produced no expert accounting evidence to counter the proof adduced by the government by way of Ms. Hansen and from Mr. Buntz, the cost negotiator. Accordingly, appellant has failed to meet its burden.

7. The contractor's indirect cost rate for fiscal year 1981 is 42.72%. T. p. 119. The amount of funds overrecovered by the contractor under the contract in question for fiscal year 1981 is \$2,331. T. p. 119.

B. Fiscal Year 1982

8. Communications, Interest and Suspense Costs - The contractor did not include interest and suspense costs as part of its indirect cost pool. Communications costs are also unallowable as public service costs under OMB Circular A-122, ATT. B. para. 36, and it was proper for the Contracting Officer not to include these costs in the contractor's indirect cost pool.

9. ORAL and Policy Analysis - The costs incurred by these units are not administrative in nature. T. pp. 38, 41. The work produced is "not something that they [nonprofit organizations] need for the general course of administering grants and contracts like accounting and personnel and the receptionist would be." T. p. 78. The studies produced by these units, A. 4, "don't deal with the Hispanic community at large, which is NCLR's mission." T. p. 79; see A. 4. In addition, costs for lobbying and legislative activity are unallowable under OMB Circular A-122, ATT. A, para. B.4.b. and c. R. 1, Tab D, p. 118. Moreover, the contractor has been reimbursed for its research under other government contracts. T. p. 78, 81, 82, 93-96. Appellant's argument that research and development is reserved in the OMB Circular does not support its view that these are indirect costs.

10. The contractor's indirect cost rate for fiscal year 1982 is 61.21%. The amount of funds overrecovered by the contractor under the contract in question for fiscal year 1982 is \$22,324. This amount should be returned to the Department.

ORDER

The Contracting Officer's Revised Final Determination of November 5, 1987, as amended by the stipulation regarding the IPA assignment of Carola Chapa, is affirmed and the appeal of the contractor is denied. The contractor is ordered to repay the Department \$24,655.

Glenn Robert Lawrence
Member of Board of Contract
Appeals

Stuart Levin, Member of
Board of Contract Appeals

SAMUEL GRONER, Member of Board
of Contract Appeals